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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 738

CHERRIN CORP., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1–A10), is reported at 349 F. 2d 1001. The Board's Decision and Order (P.A. 29a–30a) [1] are reported at 147 NLRB 527.

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1965 (Pet. App. A11). The petition for a writ of certiorari was filed on November 12, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "P.A." refers to the Appendix to petitioner's brief filed in the court below.

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STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * * *

(3) The term "employee" shall include any employee, * * * but shall not include any individual employed * * * by his parent or spouse * * *.

* * * * *

SEC. 9. * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof * * *.

QUESTION PRESENTED

Whether the National Labor Relations Board could properly exclude an employee from a bargaining unit upon finding that she was accorded a special status because of her family relationship to the corporate employer's officers and shareholders.

STATEMENT

On December 17, 1963, the Regional Director of the National Labor Relations Board conducted an election among petitioner's office clerical employees, in which seven employees voted for the Union,[2] six

[2] Office Employees International Union, Local 10.

voted against, and the ballot of employee Marilyn Cherrin was challenged by the Union. The Regional Director sustained the Union's challenge and certified it as the bargaining representative after an investigation which disclosed that (1) Marilyn Cherrin was the daughter of Phillip Cherrin, the Company's secretary and the owner of 20 percent of its stock, and the niece of all the other shareholders and Company officers; (2) she lived in her father's house; and (3) she was the only office clerical employee not required to punch a timeclock, not paid on an hourly basis, not subject to reprimand or penalty for tardiness, and whose absences on account of illness were not recorded (P.A. 1a, 5a–6a). The Regional Director concluded that Marilyn Cherrin enjoyed special status on account of her relationship to her employer, and that thus she "does not share a sufficient community of interest with the other office clerical employees to warrant including her in a bargaining unit with them" (P.A. 7a–8a). The Board denied petitioner's timely request for review, and, after petitioner refused to bargain, found that it had violated the Act. After the Board issued an order requiring petitioner to cease and desist and to bargain on request with the Union, petitioner filed a petition for review in the court below, and the Board filed a cross-petition for enforcement.

The court of appeals sustained the Board's finding that the challenged employee was accorded special status on account of her family relationship to top

management.[1] Holding that the Board has discretion to exclude from the bargaining unit a close relative of management accorded special status, the court found that the certification of the Union was valid and enforced the order based thereon (Pet. App. A1–A10).

ARGUMENT

It is well settled that Section 9(b) of the Act gives the Board wide discretion to determine "in each case * * * what unit is appropriate for the purposes of collective bargaining." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146; *National Labor Relations Board* v. *Prudential Insurance Co.*, 154 F. 2d 385, 388 (C.A. 6); *National Labor Relations Board* v. *Weyerhaeuser Co.*, 276 F. 2d 865, 869 (C.A. 7); *National Labor Relations Board* v. *Esquire, Inc.*, 222 F. 2d 253, 255–257 (C.A. 7). The sole question presented is whether the Board abused that discretion in excluding Marilyn Cherrin from the unit involved here. The court below correctly concluded that the Board acted reasonably, and there is no conflict of decisions. Consequently there is no occasion for further review.

Special status based upon family relationships may create conflicts of interest between the employees who are accorded such status and those who are not. Ac-

[1] The court rejected the Board's finding that Miss Cherrin enjoyed a special status as a salaried employee while the other employees were hourly-rated (Pet. App. A7) but sustained all the other findings of special status.

cordingly, from the beginning of its administration of the Act, the Board automatically excluded management's lineal and collateral relatives from otherwise appropriate bargaining units. *E.g., Louis Weinberg Associates, Inc.*, 13 NLRB 66; *O. U. Hofmann*, 55 NLRB 683, affirmed, 147 F. 2d 679 (C.A. 3); *P. A. Mueller & Sons, Inc.*, 105 NLRB 552; *Jerry & Edythe Belanger*, 32 NLRB 1276. In *National Labor Relations Board* v. *Sexton Welding Co.*, 203 F. 2d 940 (*per curiam*), however, the Sixth Circuit disapproved the Board's automatic exclusion policy. Thereafter, the Board modified its policy and has excluded relatives of top management only upon a showing that they were in fact accorded special status on account of family ties. *International Metal Products Co.*, 107 NLRB 64, 66–67; *Niagara Beer Distributors Association*, 108 NLRB 1571, 1574; *American Steel Buck Corp.*, 107 NLRB 554, 556; *Giordano Lumber Co., Inc.*, 133 NLRB 205, 207, n. 7; *MacIntyre Motor Co.*, 119 NLRB 54, 56. In this case, it is clear that Marilyn Cherrin had close family ties with the stockholders and officers of the Company and, as the court below correctly held, there was sufficient evidence to support the Board's finding that she was accorded a status different from that of the other employees because of her relationship to management.

The Board's revised policy is plainly reasonable, as the Sixth Circuit properly held in approving its application here, and petitioner has made no showing to the contrary. See also *National Labor Relations*

Board v. *Volney Felt Mills, Inc.*, 210 F. 2d 559 (C.A. 6) (*per curiam*). Although no other court of appeals has had occasion to consider the validity of the particular rule applied here, special status based on factors other than family relationship has been held to be a proper ground for exclusion. See *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690, 694 (C.A. 4) (confidential secretary).

Petitioner's argument (Pet. 6) that Section 2(3) deprives the Board of its usual discretion to determine the proper unit placement of employees when the employee in question is related to corporate management is without merit. That section provides only that an employer's children and spouse are not "employees" within the meaning of the Act;[4] it does not direct the Board to include any employee in any particular unit. The legislative history of Section 2(3) discloses no congressional intention to limit the Board's power to determine appropriate bargaining units under Section 9(b).[5]

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[4] Since petitioner is a corporation, Marilyn Cherrin is not the child of her employer within the meaning of Section 2(3).

[5] S. Rep. No. 573, 74th Cong., 1st Sess., 7, reprinted in 2 Legislative History of the National Labor Relations Act, 1935, p. 2306, states only that Congress decided to exclude the named categories of workers "[f]or administrative reasons" but decided not to "exclude employees working for very small employer units. The rights of employees should not be denied because of the size of the plant in which they work."

Significantly, while Congress has several times amended Sections 2(3) and 9 since the Board began excluding top management's relatives from bargaining units, it has never outlawed the practice. "[I]t is a fair assumption that * * * Con-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1965.

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gress accepted the construction placed thereon by the Board * * *." *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365–366.